No. 77-52

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–52

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent in his answering brief essentially adopts the reasoning of the court of appeals, arguing that the Interstate Agreement on Detainers Act on its face makes the United States both a sending and receiving state and that the Act must be applied to transfers of state prisoners by writ of *habeas corpus ad prosequendum* to avoid circumvention of its purposes. For reasons set forth in our opening brief, we believe those arguments to be incorrect. Several subsidiary matters set forth in respondent's brief, however, warrant additional comment.

1. In his brief respondent contends (Br. 13–17) that several provisions in the text (Articles II and VIII)

and enabling statute (Section 4) of the Detainers Act, as well as some items of legislative history, provide firm evidence that Congress meant to bind the federal government as both a sending and receiving state. The United States has already acknowledged (Br. 16–17) that certain provisions of the Interstate Agreement on Detainers Act can be read literally to suggest that it participates in the Agreement as both a sending and receiving state. At the same time, however, we have pointed out that such a literal reading of the statute leads to inconsistencies and untoward results not contemplated by Congress and further that a review of the legislative history of the Act as a whole demonstrates Congress' intent to join the United States only as a sending state. Nothing cited by respondent persuasively undercuts that position.

As we noted in our opening brief (Br. 12, 30 n. 24), the Interstate Agreement on Detainers was enacted by Congress without amendment in 1970 and is virtually identical in its language to the original draft promulgated in 1956 under the auspices of the Council of State Governments. Compare, Council of State Governments, *Suggested State Legislation Program for 1957*, 79–85 (1956), with 18 U.S.C. App., pp. 4475–4478. Indeed, Articles II and VIII and Section 4 of the federal enactment, upon which respondent places special emphasis (Br. 13–14), are nothing more than verbatim versions of Articles II and VIII and Section 3 in the original draft. While the statutory language may suggest that the drafters of the Agreement

contemplated that each member jurisdiction (perhaps even including the United States) would participate fully in a sending and receiving capacity, the language provides little meaningful insight into the independent legislative intent of Congress in enacting the Agreement.

We further note that respondent, despite his insistence on literal construction of the Agreement, also finds it necessary at times to look behind the seemingly plain language of the Agreement to avoid an obviously unintended result. Thus, respondent maintains (Br. 28–29) that the requirement of Article IV (a)—that transfer of the prisoner must be delayed for 30 days to give the governor of the sending state an opportunity to disapprove the request—was meant only to preserve existing rights under extradition statutes, although nothing on the face of the Agreement limits its applicability to interstate rather than state-federal transfers.[1] Thus, respondent appears to recognize, as this Court has done, that a search for actual, not merely apparent, intention is entirely appropriate where, as here, strict adherence to the language of a statute would produce awkward and illogical results.

At other times, respondent appears simply to disregard the literal language of the Act. He offers no

[1] Indeed, in at least one case, a defendant transferred from state custody to federal court pursuant to an *ad prosequendum* writ has claimed that his immediate transfer violated the 30-day delay proviso of Article IV(a). *United States* v. *Frye*, C.A. 8, No. 77-1495, decided December 19, 1977.

explanation of the language in Article IV(c) (the speedy trial provision), which by its terms applies only to proceedings "made possible by this article." As we have noted (Br. 33, 49), it is fanciful to suggest that federal trials of state prisoners, long carried out through use of the *ad prosequendum* writ, were in any sense "made possible" by the Detainers Act in a case where, as here, the traditional writ was employed just as it had been in the past. Thus, even a purely literal reading of the Act, without any regard for its legislative history, cuts against respondent's position.

Turning to the legislative history, respondent seeks (Br. 15–17) to derive congressional intent from a letter to the Chairman of the House Judiciary Committee from Graham W. Watt, Assistant to the Commissioner of the District of Columbia, which was appended to both the House and Senate reports recommending enactment of the Agreement. The letter, which focused primarily on the impact of the Agreement on the District of Columbia, also included the observation that passage of the legislation would "entitle the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer." S. Rep. No. 91-1356, 91st Cong., 2d Sess. 7 (1970); H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 7 (1970). Whatever weight that statement might merit in a letter from a *federal* official, however, the

fact remains that it represents only the view of a local official on an issue with which he was not concerned. Significantly, the view is not supported by the comparable letter from the Deputy Attorney General, which makes no mention of this potential result and contains not the slightest indication that the Agreement was understood to apply to the federal government in a receiving capacity. See S. Rep. No. 91-1356, *supra,* at 5–6; H.R. Rep. No. 91-1018, *supra,* at 5–6. Accordingly, Mr. Watt's letter hardly provides a reliable indicator of congressional understanding on this complex matter.

Moreover, it is significant that the House and Senate Committee Reports, which categorically state that "unless the legislation is made applicable to the District, its prosecuting authorities would not be able to have a prisoner in a party State made available for disposition of local detainers" (S. Rep. No. 91-1356, *supra,* at 4; H.R. Rep. No. 1018, *supra,* at 4), express no comparable concern with respect to the federal government. Similarly, both committee reports focus only upon the history of abuses of detainers filed by states against federal prisoners; they do not acknowledge any similar practice of abuses by the federal government of detainers lodged against state inmates or any problems encountered by federal prosecutors in utilizing the *ad prosequendum* writ to secure the presence of defendants incarcerated in state facilities. In short, there is no evidence whatever that Congress or the Department of Justice, which sponsored the bill, shared Mr. Watt's view that the federal government would participate as a receiving state under the Agreement.

2. To rebut our submission that the federal government has long been able to obtain state prisoners by writ of *habeas corpus ad prosequendum*, respondent relies on *Ponzi* v. *Fessenden*, 258 U.S. 254, for the proposition "that a federal court by issuance of the writ could not compel production of a state prisoner" (Br. 23). The only question presented in *Ponzi*, however, was whether an *ad prosequendum* writ issued by a *state* court was effective against federal custodians, who had agreed to comply with the terms of the writ over the prisoner's objection (258 U.S. at 255–256); the Court was not required to consider, and did not decide, whether a federal writ could be enforced under the Supremacy Clause against state officials who refused to comply voluntarily.[2] Similarly, none of the

[2] As one commentator has noted, "[t]he Court gave no consideration to whether the accusing jurisdiction has a duty to provide a speedy trial or to whether the imprisoning jurisdiction has a duty to surrender a prisoner to a jurisdiction demanding implementation of its speedy trial guarantee." Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. Cin. L. Rev. 179, 184–185 (1966).

Respondent also cites (Br. 22–26) a handful of scattered cases to support the view that federal authorities before the Agreement did have difficulty obtaining custody of state prisoners for prosecution on federal charges. In addition, respondent quotes one state official (Br. 21) to the effect that federal officials may in some cases have abused the detainer system by filing detainers for the sole purpose of hampering an inmate's prospects for parole. Respondent provides no evidence, however, that these materials were presented to, or reviewed by, Congress during its rather abbreviated consideration of the Act. Moreover, it is highly unlikely that Congress, even if it had been aware of such occasional problems, would have intended to deal with these isolated incidents by such a drastic remedy as imposing on the writ of *habeas corpus ad prosequendum* the substantial restrictions contained in the Agreement.

later cases cited by the respondent (Br. 23–24), suggesting that state compliance with a federal *ad prosequendum* writ is purely a matter of comity, addresses the question whether the Supremacy Clause would obligate a non-cooperating state to comply with a federal writ.[3] See *United States* v. *Mauro*, 544 F. 2d 588, 596, n. 1 (C.A. 2), certiorari granted, No. 76–1596, October 3, 1977 (Mansfield, J., dissenting). As Judge Mansfield has observed (*ibid.*), there is no necessary inconsistency "between these decisions, which recognize the role of comity in securing federal-state cooperation, and a case requiring application of the Supremacy Clause when comity might fail."[4]

Respondent also maintains (Br. 25–26) that, before the federal government joined the Agreement, federal officials were not required to seek custody of a state prisoner in order to give him a speedy trial. In *Nolan* v. *United States*, 163 F. 2d 768 (C.A. 8), certiorari denied, 333 U.S. 846, and *United States* v. *Jackson*,

[3] According to respondent (Br. 22, n. 15), the notion that federal courts were powerless to compel the production of a state prisoner for trial may be traced to *Ex parte Dorr*, 3 How. 103, 105. Although there is dictum in that case to support respondent's view, the holding of the Court was only that the language of Section 14 of the first Judiciary Act did not empower federal courts to issue writs of *habeas corpus ad subjiciendum* to inquire into allegations that a state prisoner was being held under a state statute that violated the United States Constitution. That situation was remedied by subsequent legislation. See *In re Neagle*, 135 U.S. 1; *In re Burrus*, 136 U.S. 586.

[4] One commentator has remarked, in this regard, that "the statutory [federal] writ is the supreme law of the land and the imprisoning state has no choice but to yield the prisoner, anything in its law to the contrary notwithstanding." Schindler, *supra*, 35 U. Cin. L. Rev. at 192.

134 F. Supp. 872 (E.D. Ky.), however, the courts, relying on *United States ex rel. Demarois* v. *Farrell*, 87 F. 2d 957 (C.A. 8), ruled only that a prisoner held in one jurisdiction and accused of a crime by another jurisdiction lacked standing to question the discretionary exercise of jurisdiction over his person by the two sovereigns involved, a principle announced in *Ponzi* and followed in numerous lower court opinions. Moreover, prior to *Barker* v. *Wingo*, 407 U.S. 514, the federal courts had generally held that federal defendants waived their speedy trial rights in the absence of an appropriate demand. Thus, although a federal prosecutor often might await the end of a state defendant's sentence before pressing federal charges, he could be made subject to a different obligation where the defendant demanded a speedy trial, an obligation that he had the power to discharge by seeking a writ of *habeas corpus ad prosequendum*. Contrary to respondent's assertion, that obigation was not inapplicable to state prisoners because they were deemed responsible for their own incarceration in another jurisdiction. Indeed, in *Fouts* v. *United States*, 253 F. 2d 215, 217–218 (C.A. 6), the court of appeals specifically declared that an accused did not forfeit his right to a speedy trial by virtue of his confinement in the penitentiary.[5]

[5] After that case was remanded for determination of a waiver issue, the district court concluded that the defendant had waived his right to a speedy trial. See *United States* v. *Fouts*, 166 F. Supp. 38 (S.D. Ohio), affirmed, 258 F. 2d 402 (C.A. 6), certiorari denied, 358 U.S. 884. See also *Morland* v. *United States*, 193 F. 2d 297 (C.A. 10) (waiver of speedy trial right found where defendant had neglected to demand an earlier trial). Indeed, as examples of the "many instances" in which federal prosecutors would await the completion of a state sentence before securing custody of a state prisoner for trial, respondent cites the two cases (*United States* v. *Fouts*, *supra*, and *Morland* v. *United States*, *supra*) in which the defendants were held to have waived their speedy trial rights, and one case (*United States* v. *Lebosky*, 413 F. 2d 280 (C.A. 3), certiorari denied, 397 U.S. 952) in which the eight month pretrial delay was held not unreasonable. In *Wzesinski* v. *Amos*, 143 F. Supp. 585 (N.D. Ind.), there is no evidence that defendant had made any request to be accorded a speedy trial on the federal charges.

In any event, whatever one may conclude from the various materials cited by respondent in this connection, there is simply no support in the relevant legislative history for respondent's conclusion that Congress itself, in enacting the Agreement, was concerned about the adequacy of existing federal procedures for securing custody over state prisoners and that Congress therefore intended the United States to be both a sending and receiving state.[6] As we discussed in our opening brief (pp. 29–32), the House and Senate Reports do not discuss any supposed need for new procedures to help federal prosecutors secure the presence of state prisoners but focus instead on the opportunity for state prosecutors to obtain federal prisoners. We believe that the Detainers Act should be construed in light of that understanding.

[6] We note that, although the Department of Justice participated in the drafting and evaluation of the Agreement on Detainers, the principal proponent of the Agreement within the Department was the Bureau of Prisons, whose sole concern is the role of the United States as a sending state. See, *e.g.*, Council of State Governments, *Summary of Meeting on the Agreement on Detainers*, Baltimore, Maryland (August 28, 1966).

3. In his brief, respondent also attempts to show (Br. 31–33) that federal participation as a receiving state under the Agreement can readily be harmonized with the subsequent enactment of the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.* This claim does not withstand analysis.

At the outset, we note that respondent does not rebut the materials cited in our brief (Br. 38–41) to show that Congress had no understanding that the Agreement already bound the federal government as a receiving state; rather, he relies only on inferences drawn from commentary to the American Bar Association's *Standards Relating to a Speedy Trial* (Approved Draft 1968). While it is true that the transfer provisions of the Speedy Trial Act (18 U.S.C. (Supp. V) 3161(j)) were adopted from the ABA's Standard 3.1, that fact alone does not mean that the intentions of the drafters of the ABA standards were coextensive with the intent of Congress in enacting the statute, and respondent provides no proof that Congress relied on the commentary in passing the Act. Moreover, even if the intentions of those drafters be thought pertinent, there is no evidence that they viewed the procedures outlined in the Interstate Agreement on Detainers as the exclusive means for implementing the Standards' general guidelines (see *Standards Relating to a Speedy Trial, supra,* at 2–3, 33–35, 36, 38) or considered adoption of the Agreement to be a prerequisite to implementation of the standards. At most, the materials cited by respondent suggest that the

drafters regarded the procedures in the Agreement as illustrative, a view that in no way conflicts with Congress' apparent belief that the Agreement did not apply to the federal government as a receiving state.

We have also pointed out (Br. 38–39) that certain provisions of the Agreement, particularly the 30-day delay required by Article IV(a) of the Agreement, would frustrate the primary purpose of the Speedy Trial Act to assure the speediest practicable trial. While respondent suggests that Article IV(a) does not mean what it says (see p. 3 *supra*) and further that such inconsistencies are a reasonable consequence of the different purposes of the two statutes (Br. 33–34), the more plausible explanation (and the one most consistent with the legislative history of the Speedy Trial Act) is that Congress simply did not believe the Agreement applied to the federal government as a receiving state. Though not conclusive, that later belief of Congress is surely relevant in determining whether the Agreement was intended to accomplish a significant reordering of the method by which federal prosecutors had previously obtained state prisoners for trial.

4. Turning to the waiver issue (see Gov't Br. 53–59), respondent contends (Br. 42–45) that the timely assertion of his constitutional right to a speedy trial and the invocation of local speedy trial rules should be allowed to excuse his conceded failure to raise before the district court a specific claim of non-compliance with the speedy trial provisions of the Interstate Agreement on Detainers. Indeed, respondent stresses as support for his argument the fact that his

general speedy trial objections were made before any court had held the federal government bound by the Agreement when it secured the presence of a state prisoner pursuant to an *ad prosequendum* writ. We take a different view.

The facts of this case demonstrate quite effectively why speedy trial claims on other grounds do not serve to raise the issue under the Agreement. After examin-
why speedy trial claims on other grounds do not serve
ing the relevant circumstances, the court of appeals concluded (Pet. App. 22a–24a) that all adjournments prior to February 18, 1975, had been properly granted by the district court and that respondent's claim depended entirely on delays occurring after that date. Had respondent incorporated his claim under the Agreement in his initial motion to dismiss, dated November 4, 1974, the government and the trial court, having been put on adequate notice, might well have been able to assure that respondent's trial commenced within the period required by Article IV(c). At the very least, respondent (who had the assistance of competent counsel) had an obligation to claim this statutory benefit before conclusion of the proceedings in the district court and transmission of the case to the court of appeals.[7]

[7] In *United States* v. *Scallion*, 548 F. 2d 1168 (C.A. 5), petition for a writ of certiorari pending, No. 76–6559, the Fifth Circuit held, in considering a claim under the Agreement that it also rejected on other grounds, that the defendant had waived any violation of the speedy trial provision of Article IV(c) by failing to raise the issue in a timely fashion (*id.* at 1174), even though the defendant had moved prior to trial—as did respondent here—to dismiss the indictment on constitutional speedy trial grounds.

We also note that, if a failure to raise claims under the Agreement were not treated as a waiver, some defendants might be encouraged to withhold those claims for tactical reasons. For example, the Second Circuit has held that, as dismissals under Article IV (c) apply only to the offenses actually charged, reindictment on related but separate charges is permissible. *United States* v. *Cumberbatch*, 563 F.2d 49 (C.A. 2), petition for a writ of certiorari pending, No. 77–5590. In such cases, as the Court has indicated in discussing the waiver provisions of Rule 12 of the Federal Rules of Criminal Procedure,

> there would be little incentive to [raise the issue before trial] * * * when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Davis v. *United States*, 411 U.S. 233, 241. See also *Wainwright* v. *Sykes*, No. 75–1578, decided June 23, 1977, slip op. 17. A defendant with a colorable claim under the Agreement, especially a defendant like respondent who has demonstrated no significant prejudice as a result of the delay, thus might elect to assert only a portion of his speedy trial claim while postponing others to minimize the likelihood of reindictment on related charges.

Finally, we believe that respondent mistakenly relies (Br. 44) on *United States* v. *Cyphers*, 556 F. 2d 630 (C.A. 2), petition for a writ of certiorari pending, *sub nom. United States* v. *Ferro*, No. 77–326, as authority for the proposition that Rule 12 of the Federal Rules of Criminal Procedure does not bar the untimely assertion of a speedy trial claim under Article IV(c) of the Agreement. See also *United States* v. *Eaddy*, 563 F. 2d 252 (C.A. 6). While we believe that *Cyphers* and *Eaddy* are incorrectly decided, we also note that neither defendant was aware at the time of trial that a detainer had been filed against him. *United States* v. *Cyphers*, *supra*, 556 F. 2d at 635; *United States* v. *Eaddy*, *supra*, 563 F. 2d at 255. Thus, those cases arguably fall into that category of cases where the defendant was not aware of the necessary facts to assert a timely claim. See, *e.g.*, *Askins* v. *United States*, 251 F. 2d 909 (C.A. D.C.). Here, by contrast, respondent has never suggested that he was unaware of the detainer's existence during the pretrial period in which he claims his rights under the Agreement were violated.

CONCLUSION

For the reasons stated herein and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978